**U.S. Department of Labor**

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

**Issue Date: 01 July 2004**

**CASE NO. 2003-LHC-01494**

**OWCP NO. 15-043151**

*In the Matter of:*

**PRANOM DEGUZMAN**,
Claimant,

vs.

**NAVAL MILITARY PERSONNEL COMMAND MWR/NAF**,
Employer,

and

**CCSI,**
Carrier.

*Appearances:*

*For the Claimant:*
Jay Lawrence Friedheim, Esq.

*For the Respondents:*
Kitty K. Kamaka, Esq.

*Before:*
William Dorsey
Administrative Law Judge

## DECISION AND ORDER

Pranom DeGuzman (Claimant) worked for Naval Personnel Command (Employer) for over a decade, most recently as a laundry worker at a facility in Hawaii. Now fifty-six years old, she seeks permanent total disability compensation and medical benefits for a shoulder injury she

suffered while working on October 15, 1998. This claim was filed under the Nonappropriated Fund Instrumentalities Act[1], 5 U.S.C.A. § 8171 *et seq*. (2003), (the Act) in March 2003.

At the trial held in Honolulu, HI on July 10, 2003, Employer offered Exhibits 1 through 15 into evidence, which were admitted without objection, except for Exhibit 15, a transcript of the Claimant's deposition. TR at 8. Claimant argued it was inadmissible because she had not been provided with a copy before trial. Claimant's deposition statements are admissible as admissions of a party-opponent, so Employer's Exhibit (EX) 15 was admitted into evidence. Fed. R. Evid. 801(d)(2). Claimant offered Exhibits 1 through 23, all of which were admitted into evidence at trial, except for Claimant's Exhibit (CX) 22. Hearing Transcript (TR) at 7. Claimant offered that videotape to demonstrate her job duties as of September 24, 2000, but Employer objected, claiming it misrepresented her work. TR at 154. The tape was not admitted at trial, but both parties agreed that Employer would be allowed to rebut the video by submission of post-trial statements describing the circumstances under which the recording was made. The rebuttal declarations of Alice Park and Sone Chanthavong are admitted into evidence as EX 16 and EX 17; the videotape as CX 22.

At the beginning of trial, counsel for Claimant referred in passing to a potential second injury, but in pre-trial filings both parties gave October 15, 1998 as the injury date. Claimant did not move to amend the pretrial statement. Claimant's oblique, unsupported reference is insufficient to raise the issue of a second injury, especially when her evidence never identified its date.

## Findings of Fact

Based on both parties' pre-trial statements, no dispute exists about these issues:

1. The Act applies to this claim for benefits;

2. An employer-employee relationship existed between Claimant and Employer at the time of the October 15, 1998 injury;

3. On October 15, 1998, Claimant's average weekly wage was $326.15.

4. Claimant's injury arose out of and in the course of her employment;

5. Her claim was timely noticed and timely filed;

6. Claimant's injury entitles her to compensation and medical benefits;

7. Employer has provided both compensation and medical benefits;

8. Claimant received temporary total disability benefits from October 16, 1998 to April 12, 2002 in the amount of $217.43 per week;

[1] The Act is an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq*., as amended by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639-1655 (1984).

9. Claimant has received permanent partial disability benefits since April 13, 2002 in the amount of $11.00 every two weeks;

Claimant completed high school in her native Thailand. TR at 28. Peter DeGuzman was stationed there as a member of the U.S. Air Force in 1968. They met, wed in 1969, and returned to the United States in 1970, where they settled in Mr. DeGuzman's home state of Hawaii and raised four children. TR at 28, 30-33, 83. Claimant converses comfortably in English, which she speaks to her children at home. She testified that she neither reads nor writes in English, other than her own name. TR at 37. When she became a U.S. citizen in 1975 she took the citizenship examination orally. TR at 35.

Claimant was employed as a janitor at the Pearl Harbor Naval Station in 1983, took approximately a year of leave in 1986 after the birth of her fourth child, and returned to work in 1987. TR at 34. She transferred from that position to one as a full-time laundry worker at Pearl Harbor Naval Station on September 18, 1992. TR at 34, 41, 106; CX 14; EX 1.

Miguel Delgadillo and Alice Park supervised Claimant in that work. When Mr. Delgadillo interviewed and hired Claimant for the position, he did not ask her to fill out an application form or test her ability to read and write English. TR at 131-132, 142. Both supervisors testified that workers maintained a running inventory of the linen in a log book, so in her position of laundry worker Claimant read and wrote some minimal English. TR at 109, 126-129.

The parties stated in their pre-trial statements that Claimant's average weekly wage on October 15, 1998 was $326.15. At trial, however, Claimant contended that the $326.15 average weekly wage figure was incorrect, relying instead on an evaluation and interview of Claimant conducted by the Hawaii state Career Development Center that reported her then wage as $9.29 per hour. CX 11. Were that her wage, her average weekly wage would be $371.60. On this issue, however, I credit Claimant's wage earning statement of October 21, 1998, which was generated from Employer's payroll records of Claimant, and which gave $8.55/hour as her hourly rate on October 15, 1998. EX 12, CX 19 at 6-7. Multiplying that rate by a 40 hour work week yields the correct average weekly wage of $326.15, and a gross yearly income of $16,959.61. EX 12; CX 19 at 6-7.

On October 15, 1998, she picked up linens from six buildings that comprised Pearl Harbor Naval Station's Combined Bachelors' Quarters, loaded them into a truck or station wagon, and transported them to the facility where she and others washed, dried and folded them. TR at 42, 107; EXs 1, 14. Claimant and other laundry workers loaded the folded linens into bags marked with numbers that identified the buildings they came from for re-delivery. TR at 107-108. Claimant, who stands five feet, one inch tall, regularly had to step up onto the rear bumper of the vehicle to load the linens. TR at 42. As she did so that day, the bumper suddenly fell off and Claimant was thrown face-forward to the ground. TR at 42. She tried to extend her arms to catch herself before impact, but struck the ground hard, first with her knees, then with her upper body. EX 15 at 37. She immediately felt pain along the right side of her body, extending along her right leg down to the foot. CX 14. She returned to the laundry area and reported the incident to Ms. Park, who in turn reported it to Employer; Claimant finished her shift that day despite her pain. CX 14; EX 15 at 47.

She went to her regular physician at Kaiser Moanalua after work, who examined her and referred her to a physician in Occupational Medicine, Ronald Gackle, M.D. EX 2; EX 15 at 19-20, 45-46. After his exam on October 23, 1998, Dr. Gackle restricted her from lifting over two pounds, but scheduled no surgery. TR at 47; CX 4 at 3-4; EX 15 at 46. Claimant provided the written restriction to Ms. Park on October 26, 1998. CX 4 at 3; EX 15 at 47.

At trial, Claimant testified the supervisors required her to perform all her pre-injury duties after the fall, despite her continued right shoulder pain. TR at 45. She claimed she related this to her physicians, who again informed Employer of her medical restrictions and renewed the recommendation that she be placed on light duty. TR at 45-46. Claimant testified that the supervisors persisted in requiring her to perform all her pre-injury duties, but watched her to determine whether they exceeded her limitations. At trial, Mr. Delgadillo and Ms. Park testified that Claimant was given light duty, folding towels while seated. TR at 121, 133-134. Claimant agreed that she folded towels, but while standing rather than sitting; folding the towels had been one of her pre-injury duties. TR at 75-76.

In this dispute over whether the restrictions were honored, I credit the testimony of Mr. Delgadillo and Ms. Park, over that of Claimant. Both supervisors' statements that Claimant was placed on light duty status in accordance with her medical restrictions outweigh Claimant's uncorroborated testimony that Employer failed to place her on light duty. Furthermore, the affidavits of Ms. Park and of Sone Chanthavong persuade me that the videotape admitted into evidence as Claimant's Exhibit 22 fails to accurately represent her post-injury job duties.

At some unspecified later time, Claimant stated that while working under the observation of three supervisors she heard a pop in her right shoulder. TR at 46; CX 5 at 3. She immediately felt pain and became unable to lift her right arm. TR at 46. No specific date for this event was given at trial. In his Orthopedic Consultation Report dated June 22, 1999, Darryl Kan, M.D., stated that Claimant suffered from chronic impingement tendonitis with possible rotator cuff tear in her right shoulder, and recommends an MRI scan to fully ascertain the status of the rotator cuff. CX 3. The June 22 report makes no reference of any possible second injury and lists October 15, 1998 as the only date of injury. *Id.*

The MRI scan of July 1, 1999, confirmed Dr. Kan's diagnosis of rotator cuff tear, specifically a complete disruption of the supraspinatus and infraspinatus tendons with fluid dissecting in the fascial planes. CX 2. After receiving these results, Dr. Gackle referred her back to Dr. Kan on July 16, 1999 for surgical repair. CX 3 at 6. Dr. Gackle's July 16 report listed October 15, 1998 as Claimant's date of injury. CX 3 at 6.

Dr. Kan discussed the surgery with Claimant on August 12, 1999 and saw her for a preoperative examination on August 26, 1999. CX 3 at 7, 9. His reports of both appointments cited October 15, 1998 as Claimant's date of injury. CX 3 at 7, 9. On September 2, 1999, Dr. Kan repaired her shoulder with arthroscopic surgery. CX 3 at 11.

In his post-operative report of October 18, 1999, Dr. Kan initially cleared Claimant to return to light duty by December 6, 1999. He defined light duty as work at a sedentary position

that required neither lifting of more than 10 lbs. nor repetitive overhead activities. CX 3 at 16. By November 11, 1999, Dr. Kan's report indicates that Claimant was showing marked improvement in the shoulder. CX 3 at 18. Dr. Kan placed Claimant on a strengthening program for the shoulder on January 6, 2000, with the goal of enabling her return to work by February 7, 2000. CX 3 at 23. She did return to work on February 7, 2000, but pain returned in her shoulder after one week. CX 5 at 4. On March 20, 2000, she again returned to limited duty, with a restriction against lifting more than 15 lbs., and continued working as a laundry worker for Employer until October 26, 2000. CX at 4; EX 15 at 29.

After Dr. Gackle examined Claimant on February 5, 2001, his evaluation remained similar to Dr. Kan's, restricting her from lifting more than 10 lbs., from pushing and pulling, or reaching with her hands above shoulder level. CX 17. He concluded that Claimant had reached maximum medical improvement on August 23, 2000 and that she was able to perform full-time, sedentary work within the restriction he gave. *Id.*

Barbara Boddy, a vocational rehabilitation counselor, evaluated Claimant on April 23, 2001. She found that Claimant's vocational aptitudes were low, including her reading ability, and recommended that she be trained at a sheltered workshop such as Goodwill Industries for other jobs. CX 12 at 6. Faith Lebb provided Claimant vocational rehabilitation services for about a year, from February 20, 2001 to February 1, 2002. CXs 10, 12. After reading Ms. Boddy's evaluation and interviewing Claimant, she placed Claimant in an entry-level cashier and customer service training program from June 18, 2001 to September 28, 2001 at Goodwill Industries to teach her to operate a cash register and perform customer service. CX 12 at 13-15, 27, 30. After Claimant completed the program she received a total of 34 specific job leads for positions as a customer service clerk or cashier, on October 2, 10, 19 and 25, 2001, as well as on November 1, 9, 16, 23 and 30, 2001 and on January 4, 11, 16, and 25, 2002. CX 12 at 28-36.

Records from November 30, 2001 to February 1, 2002 show that she applied to 6 of the 34 leads Ms. Lebb provided. EX 11. Claimant testified that she also applied for a cashier position with Employer, but was informed that the position was reserved for outside applicants. TR at 56. Claimant's medical restrictions eliminated some of the jobs that required the ability to lift over 10 lbs. CX 12 at 33. Others required applicants to pass a preliminary math test with word problems or administered tests on a computer, which discouraged Claimant from applying. CX 12 at 32-33, 35. Claimant and her husband testified at trial that she would go to some of the prospective employers, pick up an application and bring it home, where her daughter would help her fill it out. TR at 54, 93. She submitted completed applications to a gasoline station and a bakery, neither of which contacted her. TR at 53-54. She believed that prospective employers knew she could not write English and she was too embarrassed to follow up the status of her applications. TR at 56. An additional report prepared by vocational rehabilitation specialist Janice Tavares on June 25, 2003 concluded that Claimant is not employable in the Hawaii labor market due to medical restrictions, limited English language skills and lack of transferable skills. CX 23 at 4.

Despite Ms. Tavares' qualifications, I am inclined to give her opinion less weight than that of Faith Lebb, Claimant's first vocational rehabilitation specialist, based partly on the amount of time that had passed since the initial vocational rehabilitation services were rendered

and partly because of Claimant's demonstrated ability to communicate in English during her 33 years in Hawaii, both at home and at her former workplace.

Frustrated with the lack of progress, Claimant dropped out of participation in vocational rehabilitation services on February 1, 2002. Claimant continues to feel pain in her shoulder that keeps her from taking another job as a janitor or laundry worker. TR at 57. She has not worked since her last date of employment at Employer's facility on October 26, 2001, and is not presently seeking work. She currently receives permanent partial disability benefits in the amount of $11.00 every two weeks. TR at 25.

## Issues for Adjudication

These are the remaining issues for adjudication:

1. What is the Claimant's disability; and

2. What measure of benefits and compensation are due to Claimant.

## Conclusions of Law

An employment relationship existed between Claimant and Employer at the time of the alleged injury and both parties are subject to the Act's jurisdiction. The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vizzolo, Inc. v. Britton*, 377 F.2d 133 (D.C. Cir. 1967). I am entitled to evaluate the credibility of the witnesses, to weigh the evidence and draw my own inferences, and am not bound to accept the opinion or theory of any particular medical examiner or other expert. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chi. Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467 (1968).

As both parties agree that Claimant suffered a compensable injury that arose out of and in the course of her employment, I need not address whether compensability is presumed under Section 20(a) of the Act. Claimant's injury and subsequent disability are compensable.

Extent of Claimant's Disability

Claimant seeks reinstatement of total disability benefits. The Act defines "disability" as the incapacity because of injury to earn the wages which Claimant was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). An injured worker is presumed to be totally disabled if she shows that a work-related injury prevents her from returning to her former employment. *Newport News Shipbuilding & Dry Dock Co. v. Director, O.W.C.P.*, 315 F.3d 286, 292 (4th Cir. 2002). Claimant has the initial burden of proving by a preponderance of the evidence that she cannot return to her regular or usual employment due to her work-related injury. *Id*. At this initial stage, she need not establish that she cannot return to any employment, only that she cannot return to her employment as a laundry worker. *Elliot v. C&P Tel. Co.*, 16 BRBS 89 (1984). Employer and Claimant agree that continued pain in her

shoulder made it impossible for her to work as a laundry worker; thus Claimant has met her initial burden.

Once a claimant makes this *prima facie* showing, an employer has the burden to show suitable alternative employment is available. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). The employer must identify specific actual jobs open within the local community that Claimant could perform, given her age, education, work experience and physical restrictions. *Edwards v. Director, O.W.C.P.*, 999 F.2d 1374, 1376 (9th Cir. 1993); *Bumble Bee Seafoods v. Director, O.W.C.P.*, 629 F.2d 1327, 1330 (9th Cir. 1980). Failure to meet this burden results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Claimant was directed to specific alternative employment opportunities as part of her vocational rehabilitation program as early as October 2, 2002. Despite Claimant's assertions that these jobs did not sufficiently consider her language barrier, the listings supplied to her as potential jobs were all entry-level cashiering or customer service positions, none of which exceeded her skill level, given her successful recent training for them at Goodwill, and her demonstrated ability to work with her limited reading skills in the past. It is unlikely on its face that all of the entry-level cashier positions would be categorically closed to her. She came to the United States at a young age, has resided here 30 years in which she worked many years for Employer using English, as she does at home. At Claimant's age, with her education and training, past work experience, physical restrictions and the specific job opportunities presented to her, suitable alternative employment was available. The presumption of total disability is rebutted.

Once Employer proves the existence of suitable alternative employment, Claimant may still establish her total disability if she demonstrates that she diligently tried and was unable to secure other employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1197, 1196 (9th Cir. 1988). Rejection of suitable jobs runs contrary to the intent of Congress that injured workers return to productive work as soon as possible following an injury. *See, Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, (1986). Claimant applied to only 6 of the 34 of the leads supplied to her, without following up on a single application she turned in. She voluntarily discontinued the vocational rehabilitation program that supplied appropriate, entry-level cashier and customer service job leads to her. Her misgivings about returning to the labor force because of her limited ability to read and write English, while understandable, do not excuse her from making a good faith effort to secure jobs she could perform. Her minimal efforts to find work were not diligent.

Claimant failed to establish total disability, so her disability will be rated partial as of the earliest date on which Employer established suitable alternative employment was available. *See Stevens v. Director, O.W.C.P.*, 909 F.2d 1256, 1259 (9th Cir. 1990). Claimant was permanently partially disabled as of October 2, 2002 and continuing to the present.

Compensation Due to Claimant

Pursuant to Section 8(c)(21) of the Act, an employee whose disability is permanent and partial is entitled to 66 2/3 per centum of the difference between her average weekly wage and

her current wage-earning capacity, payable for the period of the disability. 33 U.S.C. § 908(c)(21). Her disability stems from a traumatic injury, so her average weekly wage is determined as of the time she was injured. 33 U.S.C. § 910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991). Aggravation of a traumatic injury constitutes a new injury, which entitles Claimant to benefits based on the wages earned immediately before that injury. *Kooley v. Marine Industries N.W.*, 22 BRBS 142, 146 (1989).

Claimant asserts that the "pop" in her right shoulder was a new injury for purposes of calculating her average weekly wage. Claimant never established at trial the date of the purported second injury. There is no date of second injury from which another average weekly wage could have been calculated. The medical reports of Dr. Gackle and Dr. Kan consistently cite October 15, 1998 as the date of Claimant's injury. Evidence about when a second injury occurred is so vague that October 15, 1998 remains the date of injury and the proper date for determination of Claimant's average weekly wage.

Where an employee seeks total disability benefits, but the employer proves suitable alternative employment was available, earnings in that alternate employment establish the employee's wage-earning capacity. *See Berkstresser v. Washington Metro Area Transit Auth.*, 16 BRBS 231, 233 (1984). Work as an entry-level cashier is available where Claimant resides. Operating a cash register is within her physical restrictions, and she does not claim she lacks basic math skills needed to make change at a cash register, something she does in her ordinary daily activities. Claimant's recent training and the entry-level nature of the work undercut her assertion that she cannot be a cashier. Ms. Lebb's reports, including vocational surveys and specific job leads that she supplied to Claimant, prove that she can do cashier and customer service work. Ms. Lebb's reports are contradicted only by the Employability Assessment conducted by Ms. Tavares, dated June 25, 2003, and I am inclined to give more weight to Ms. Lebb's reports for reasons discussed above.

Claimant's lost wage earning capacity is measured by the difference between her average weekly wage when she was injured and her wage earning capacity after she reached maximum medical improvement. The State of Hawaii's minimum hourly wage on October 15, 1998 was $5.25/hour. *See* Research and Statistics Office, Dep't of Labor and Indus. Relations, State of Hawaii, *A Short History of the Minimum Wage, available at* http://www.state.hi.us/dlir/rs/loihi/OMI/OTHER/MIN_WAGE.HTM (as of June 9, 2004). Claimant's pre-injury average weekly earnings of $326.15 per week on October 15, 1998 minus her likely post-injury weekly wage of $210.00/week[2] yields $132.00 per week as Claimant's lost wage earning capacity resulting from her permanent partial disability. Under Section 8(21)(c) of the Act, multiplying that amount by 66 2/3 per centum entitles Claimant to permanent partial disability benefits of $87.12 per week, payable for the period from October 2, 2002 and continuing.

For a period of 88 weeks, from October 2, 2002 to June 14, 2004, Claimant has received permanent partial disability benefits in the amount of $11.00 every 2 weeks, for a sum of $484.00. The full amount due her under the Act during that same time totals $7,665.56.

[2] This has been calculated by multiplying the $5.25/hour minimum wage in effect on October 15, 1998 (the likely pay for the entry level work she had been trained to do) over a 40 hour work week.

Subtracting the amount Claimant received from the amount she was entitled to under the Act results in a total of $7,182.56 owed her in permanent partial disability benefits from October 2, 2002 to June 14, 2004.

## ORDER

Accordingly, for the reasons discussed above, Claimant's request for permanent total disability benefits is DENIED.

Because Claimant has not received the all the benefits due her under the Act, it is ORDERED that:

1. Employer shall pay the balance of permanent partial disability benefits owed Claimant for the period from October 2, 2002 to June 14, 2004, totaling $7,182.56.

2. Employer shall pay Claimant permanent partial disability at the rate of $87.12 per week, beginning June 15, 2004 and continuing.

3. Employer shall pay interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director on all accrued permanent partial disability compensation calculated from the time each payment became due.

4. All calculations necessary for payment of this award shall be made by the District Director, which also may correct any computational errors I may have made.

5. Any petition of attorney's fees and costs must be prepared on a line item basis and comply with 20 C.F.R. § 702.132 in order to be considered. If a fee petition is filed by Claimant, any objection(s) by Respondents shall be stated on a line item basis, including the reason for the objection. Objections shall be filed within ten days after the fee petition is deemed received by Respondents, based on the rules for service of documents by U.S. mail. Items which are not the subject of an objection in the manner required will be treated as admitted, and will not be allowed. The parties shall then meet and confer within ten days, in an effort to eliminate objections. Within ten days after that meeting, for objections not resolved, counsel for Claimant may file a line item response to any remaining objection, within ten days after their meeting. The response shall state the date the meeting took place.

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WILLIAM DORSEY
Administrative Law Judge

WRD